INDEPENDENT HUMAN RIGHTS ACT REVIEW

RESPONSE

BY CERTAIN MEMBERS OF THE SOCIETY OF CONSERVATIVE LAWYERS

The Society of Conservative Lawyers is an association of lawyers who support or are sympathetic to the aims of the Conservative Party. Members hold a range of views within those parameters.

The views expressed in this Response are only those of the authors and are not necessarily held by all members of the Society or by the Conservative Party.

About the authors:

Benet Brandreth QC practices at 11 South Square. He is a former member of the Attorney-General's 'A' Panel of Counsel and a specialist in intellectual property law.

Jonathan Fisher QC is a practising barrister in dual capacity practice at Bright Line Law and Red Lion Chambers in London. He was Chair of Research at the Society of Conservative Lawyers between 2006 and 2010, and a Commissioner on the Commission for a UK Bill of Rights between 2010 and 2011.

Timothy Foot is a student on the Bar Course and a Lord Denning Scholar of Lincoln's Inn. In 2020 he received the Wronker prize for Administrative Law and a first class BA in Jurisprudence (Oxon).

Lord Sandhurst QC is the current Chair of Research of the Society of Conservative Lawyers. He practised from One Crown Office Row under his family name as Guy Mansfield QC and was Chair of the Bar Council in 2005. Guy retired from practice on 31 March 2019.

Anthony Speaight QC practises at 4 Pump Court. He was Chair of Research of the Society of Conservative Lawyers from 2016 to 2020. He was a Commissioner on the Commission for a UK Bill of Rights between 2010 and 2011.

Andrew Warnock QC practises at 1 Chancery Lane. He was Chair of Research of the Society of Conservative Lawyers from 2013 to 2016. He specialises in the liability of public authorities in tort and under the Human Rights Act.

For further information on the Society of Conservative Lawyers contact
Cherry Clarke, Administrative Secretary
Society of Conservative Lawyers
Email: administrator@conservativelawyers.com

INTRODUCTION: CRITICISMS OF THE HUMAN RIGHTS ACT

Although its Terms of Reference confine this Review to questions on just two themes of the HRA, their proper consideration will benefit from a perspective which recognises all the potential criticisms of the Act.

In particular, the central role given to the HRA results in the loss of focus on and underutilisation of our common law rights. Further, a future Executive intent on putting aside human rights is given a single point of attack in the HRA. Both matters present an issue for those, like us, concerned to ensure that there are meaningful and effective checks on the Executive.

Rights must be protected. These of course include the Convention rights. Where issues arise over the manner of implementation of such rights and any balance to be struck, the primary place for doing so is Parliament. It is parliamentarians with their widely differing social experiences and political standpoints who should be determining how we are to live our lives. When the court finds that upon a conventional interpretation of a legislative provision there has been non-compliance with the Convention, it is better that it should say so and refer the matter back under S. 4 than strain its interpretation under S. 3.

We have a number of criticisms of the HRA as enacted and subsequently interpreted. These may be categorised (i) as 'primary' or 'core', and (ii) as 'contextual', so called because they set the wider context in which our proposed amendments must be seen.

Primary/Core Criticisms

Detraction from our common law heritage of rights

Our first concern is that the HRA, by giving such prominence to the rights set out in the European Convention on Human Rights, has drained attention away from the richness of our own common law heritage of rights.

Sir Jack Beatson and the other authors of *Human Rights: Judicial Protection in the United Kingdom*[1] observe:

> 'Three other doctrines undoubtedly played a significant part in the protection of civil liberties and human rights in this country. First, the principle that the individual is free to do whatever he or she pleases unless there is a rule of law which prohibits it: we do not in this country, as in some others, in general need a licence to do something.'

As Dicey notes in *The Law of the Constitution,* the rights of ordinary citizens in the UK were the product of the common law tradition and created through the decisions of judges.[2]

---

[1] *Beatson and Others,* Sweet & Maxwell 2008, ch. 1-10

[2] See A. V. Dicey,"*An Introduction to the Study of the Law of the Constitution*", 10th edn. (1959), ed. E. C. S. Wade (Macmillan), page 195. 'Dicey's third principle was that the unwritten constitution in the UK could be said to be pervaded by the rule of law because rights to personal liberty, or public meeting resulted from judicial decisions, whereas under many foreign constitutions such rights flowed from a written constitution.' Paper by Professor Paul Craig: "*The Rule of Law*", Section 2, <https://publications.parliament.uk/pa/ld200607/ldselect/ldconst/151/15115.htm#note175>

Arlidge, Eady & Smith on Contempt, 5th ed. at 2-153 to 154 explains matters thus:
'The "rule of law", lastly, may be used as a formula for expressing the fact that with us the law of the constitution, the rules which in foreign countries naturally form part of a constitutional code, are not the source

Very senior UK judges have regretted the tendency which has emerged to approach all fundamental rights issues solely on the basis of the Convention. For instance, in *Osborn v Parole Board*,[3] Lord Reed JSC said (para [57]):

> '[The HRA] does not supersede the protection of human rights under the common law or state, or create a discrete body of law based upon the judgments of the European court. Human rights continue to be protected by our domestic law, interpreted and developed in accordance with the Human Rights Act when appropriate'.

Two points emerge. First, at a time when the UK is striking out on its own after departure from the EU, we have a vested interest in playing up the positive features of our legal system. At such a time it is a pity for the country to be underselling its legal heritage.

Second, it has the result that criticism of the terms and effect of the HRA is seen as equivalent to criticism of the concept of human rights as such or indeed of having a UK statute which makes those rights directly justiciable in our courts.

The appearance of the politicisation of the judiciary

Our second core criticism is that the Act has involved our judges in the *wrong* sort of judicial activism in contrast to conventional and restrained 'judicial creativity'. The common law tradition involves argument by analogy and international comparison. The court must not take the reins from Parliament in breaking new ground. This is particularly important when we address **Theme Two**.

The HRA's effect has been to draw the judges into the political arena. So, the judiciary is perceived to be politicised.

Judicial activism will be better kept within appropriate bounds if S. 3 is amended. Overstrained interpretation (as S. 3 invites) is inappropriate. It will thereby be avoided. The focus would be on interpretation in accordance with long-established common law canons of construction; if such approach does not permit a construction which the court considers compatible with Convention rights it should move more readily to make a declaration of incompatibility.

Our suggested amendments to S. 3 are necessary and indeed the bare minimum that should be achieved by this review.

Of course, the judges of the common law have always practised a degree of activism in developing both rights and remedies at common law and interpreting legislation. But such activism has properly been incremental: one step at a time not two. See (most recently) Lord Reed in *Robinson v West Yorkshire Police*[4] (para [21]):

---

but the consequence of the rights of individuals, as defined and enforced by the courts; that, in short, the principles of private law have with us been by the action of the courts and Parliament so extended as to determine the position of the Crown and of its servants; thus the constitution is the result of the ordinary law of the land. This passage from Dicey's *Introduction to the Study of the Law of the Constitution*, p. 296 has exerted a significant influence on the development of the common law, and the perception of judges as to how rights should be defined and protected. The approach has been that "rights" are thought of as being "residual". A person can do or say what he pleases, unless and until the law provides otherwise. This was considered by Dicey (and others before him, such as Bentham) as the most efficacious method of protecting rights. Written constitutions and bills of rights were considered to be capable of being all too readily suspended or set aside. The common law, weaving as it does a whole fabric of liberties, protected through a system focusing on remedies rather than rights, is much more difficult comprehensively to suspend.'

[3] [2013] UKSC 61

[4] [2018] UK SC 4. Para 21

> 'The whole point of *Caparo,* which was to … adopt an approach based, in the manner characteristic of the common law, on precedent, and on the development of the law incrementally and by analogy with established authorities'.

Of course, as Lord Mance acknowledged in *Robinson* at §84: 'It would be unrealistic to suggest that, when recognising and developing an established category, the courts are not influenced by policy considerations'. But Lord Mance, significantly, also emphasised the need for the law to develop incrementally.

It is to ensure that judicial involvement returns to its conventional common law bounds that we advance our proposed amendments.

It is unfortunate that (in the format currently set out) S. 3 encourages the court to adopt any 'possible' interpretation – even if unreasonable – of statute. S. 3 has been interpreted in this way, but (see the Hansard citation of Jack Straw MP (page 20 below) it was not originally intended to be treated as such. The courts have gone beyond what Parliament intended.

Our objections to such judicial creativity are fundamental. Firstly, that it undermines the rule of law; secondly that it is incompatible with the concept of the equal dignity of all humans, which is foundation of the concept of human rights.

It undermines the rule of law because the particular invitation in S. 3 creates inappropriate uncertainty and conflicts with the intention and will of Parliament.

In *The Rule of Law*,[5] Lord Bingham identified eight characteristics or principles of the rule of law. The first is:

> 'The law must be accessible, and so far as possible intelligible, clear and predictable.'

The value of predictability of law has been recognised by many other jurists. To cite just one other example, in *Rhetoric and the Rule of Law* Professor Sir Neil MacCormick wrote:[6]

> 'There cannot be a Rule of Law without rules of law.... Values like legal certainty and legal security can be realized only to the extent that a state is governed according to pre-announced rules that are clear and intelligible in themselves.'

S. 3 runs counter to such predictability. Further, it is incompatible with the concept of the equal dignity of all humans because its practical consequence is to remove a decision from the legislature and hand it to judges. In a democratic society the legislature is answerable for its decisions to the people as a whole; on the other hand, the principle of judicial independence ensures that the judges are answerable to nobody but their own consciences.

If a decision on a topic is taken away from Parliament and placed with judges it means that the determination of the question will be made by a small stratum of highly intellectually gifted individuals. It is not a criterion in the selection of our judges that the body of the judiciary should reasonably reflect the range and diversity of political opinions or views on social issues in society as a whole. The more that the determination of questions on which strong views may be held is removed into the hands of judges the greater the tension with the concept of the equal dignity of every individual in society.

[5] 2010 (Kindle Locations 1139-1140). Penguin Books Ltd. Kindle Edition
[6] OUP 2005 p.12

Contextual criticisms

Our criticisms are not directed at the existence of the HRA itself. They go to the context in which the review is being conducted and our core criticisms and the amendments we seek.

First, we highlight as an illustration of the judicial tangles created by the HRA the issue of euthanasia. Few questions are more pre-eminently ones which should be handled and resolved by the legislature in a democratic society. Yet such is the wide interpretation to which Art. 8 of the Convention is open, that some judges have accepted the proposition that it is infringed by the prohibition on assisted suicide.

The case of *Nicklinson v Ministry of Justice*,[7] which we address under **Theme One, Q. 1 (b)** shows the dangers of the current approach.

It is, of course, legitimate for the legislature to resolve issues in advance by indicating that it is content with being subject to the effect of the provisions of the Convention even in relation to matters as yet unconsidered by Parliament or the Court in Strasbourg. However, we question whether it was the intention of Parliament that the effect of Ss 3 and 4 might be to take significant issues from its hands altogether and put them into the hands of the judiciary. That has informed our consideration of **Theme Two** as further set out below.

Indeed, it was to establish where the boundaries lie in the United Kingdom that some of our authors have previously suggested the creation of a British Bill of Rights instead. See "*A UK Bill of Rights? The Choice Before Us*".[8]

A further criticism of the HRA is that it is perceived by many to have fostered a 'rights' culture at the expense of a political culture which balances rights with responsibilities. That balance is better struck by parliamentarians looking at society as a whole. It is for that reason that we suggest below an amendment to **S. 3** to include a new obligation (set out later with others):

'**The consideration that citizens have responsibilities as well as rights**.'

Where it appears to the court that in a particular instance the interpretation of legislation is ambiguous, it would apply the approach mandated by our suggested new S. 3 (p. 23 below).

While the court's view of the role of the individual in society *as a whole* may be relevant to the decision, the court should nonetheless either decline to find that there has been incompatibility or if, but only if, satisfied that incompatibility is plain, determine that the matter is best left to Parliament by making a declaration under S. 4. The court should not strain its interpretation of the words of the statute before it.

Rights discourse should not be restricted to the narrow terms of the ECHR and legal proceedings under the HRA. Yet, because of the effect of the HRA, human rights have come to be perceived principally as legal beasts which parliamentarians have little business nurturing. This perception has pervaded Parliament itself, and the HRA has allowed parliamentarians the luxury of believing that difficult rights questions can be answered satisfactorily by others. It is to advantage if parliamentarians are driven to confront the issues which such rights raise.

Scant regard for rights has been heard in the legislative process since the end of March 2020 under which a vast body of Covid directed regulations has been made. The regulations have been made in the absence of Parliamentary debate about their timing form and content. The regulations infringe individual liberties in the most remarkable way. Such infringements may

[7] [2014] UKSC 36

[8] Anthony Speaight QC and Jonathan Fisher QC were Commissioners. The Report (December 2012) is at https://webarchive.nationalarchives.gov.uk/20130206021312/http://www.justice.gov.uk/about/cbr/

be justifiable. The important point is that they should have been justified to Parliament in the course of meaningful debate.

In this respect we are fortified by the observations of the Joint Committee on Human Rights ('JCHR') in September 2020:

> 'The lockdown regulations have had a *huge impact on the rights of millions* of people across the country. There has been confusion over the status and interpretation of guidance, and the relationship between guidance and the law'.[9]

In short, it is important to make plain that there is no basis for the view that if there is no reason grounded on the Convention to strike down legislation whether primary or secondary, then it must be all right.

A further criticism of the HRA is that some cherished rights, which our society would, we believe, wish to identify as sufficiently important to be placed on the plane of constitutional protection, are not amongst those in the Convention.

One such right, whose absence from constitutional protection has often been regretted, is the right to jury trial. Lord Devlin famously described it as 'the lamp which shows that freedom lives'.[10] Amongst those who have argued in favour of recognising the right to jury trial are Liberty[11] and the Charter 88 movement.

Yet further, the usual current approach of the courts to S. 2 of the HRA elevates the case-law of the European Court of Human Rights at the expense of any mention of many other courts around the world whose jurisprudence might be of assistance to British judges. The value of the jurisprudence of courts of high standing in many parts of the world was illustrated by the celebrated case of *R v Horncastle*,[12] in which the Supreme Court was unusually forthright in its opinions on previous Strasbourg jurisprudence. In that case the UK Supreme Court declined to follow a Strasbourg chamber judgment in *Al-Khawaja v UK*.[13] As we argue in our answers in **Theme One**, this is a fairly unusual approach taken by the UKSC there – we would like to see it happen more often.

The judgments in *Horncastle* included references to decisions in Canada, Australia, New Zealand and the US Supreme Court. On other occasions the Supreme Courts of India and South Africa have been found of assistance. The judges at the Strasbourg Court itself evidently found this wide review of case-law from the common law world in *Horncastle* to be of value, for the Grand Chamber subsequently reversed the accepted the *Al-Khawaja* chamber decision.

There is, of course, good reason why Strasbourg judgments in cases against the UK should be given special weight. The UK has accepted a treaty obligation to abide by decisions of the European Court of Human Rights given against the UK. We address this directly in **Theme One**.

But there is no treaty obligation to apply in the UK the outcomes of cases relating to, say, Italy or Turkey (Art 46(1) ECHR). Further, there may be factors in those other countries which mean that apparently similar situations are not truly parallel.

---

[9] https://committees.parliament.uk/publications/2649/documents/26914/default/ - JCHR report e.g., paras 47-53 and 63

[10] '*Trial by Jury*' 1956, ch. 6

[11] '*A People's Charter*' 1991

[12] [2010] 2 AC 373

[13] *Al-Khawaja and Tahery v UK* [2009] 49 EHRR 1

This is not to suggest that mention of the Strasbourg Court should be removed from the HRA, but rather that mention should be added of the jurisprudence, as persuasive authority, of senior courts elsewhere in the common law world. We address this directly in **Theme One**.

The introduction of such an express recognition of the family of the common law world could also contribute to a policy of global outreach by the UK.

The relationship to the ECtHR in the HRA needs to be expressly addressed and its limits clearly set out.

Our final point is that the relationship between the State and the people has changed dramatically since the end of the Second World War and, building on fundamental principles established in the Bill of Rights of 1689. The UK lacks declared constitutional rights. It was this lack of "ownership" which led a seven[14] out of nine majority of the all-party Government Commission on a UK Bill of Rights chaired by Sir Leigh Lewis to recommend the enactment of a UK Bill of Rights:

> 'Even the most enthusiastic advocates of the UK's present human rights structures accept that, as Liberty said in its response to the Commission's first consultation paper, there is a lack of public understanding and 'ownership' of the Human Rights Act ... Many people feel alienated from a system that they regard as 'European' rather than British.'[15]

There is a respectable view that a new compact is needed to reassert British core values in a way which is relevant for the present age. But that is beyond this Review.

Conclusion

Not all of these criticisms bear *directly* on the matters that are for this Review, with its specific and restricted issues in the Terms of Reference. The present Review cannot, for example, expand the list of recognised rights or reconsider the format in which rights and obligations are enshrined in British law. But some of the problems created by the terms of the Act can be significantly improved by reforms within the Review's scope; and others can be given at least some recognition. The suggestions which we make for reforms to Ss 2, 3 and 4 HRA show ways in which, we suggest, the Act can be improved by reference to these criticisms.

We stress that the reforms which we propose will not weaken the protection of human rights. We turn now to address the themes and questions posed by this review.

[14] Sir Leigh Lewis, the late Lord Lester QC, Sir David Edwards, Lord Faulks QC, Jonathan Fisher QC, Martin Howe QC and Anthony Speaight QC

[15] '*A UK Bill of Rights? The Choice Before Us*' (fn 7 above), vol 1 para 80

THEME ONE
The relationship between domestic courts and the European Court of Human Rights

INTRODUCTION

Legislative reform of S. 2 HRA is desirable in order to consolidate and clarify the judicial interpretation of the duty to '*take into account*' Strasbourg's jurisprudence and the role of the courts when dealing with cases in the 'margin of appreciation', and to strengthen the current approach to judicial dialogue.

The locus classicus for the approach taken by the courts is Lord Bingham's speech in *R (Ullah) v Special Adjudicator*,[16] although this has been authoritatively expanded upon in subsequent judgments. Nevertheless, the *Ullah* dictum rewards revisiting:

> 'While [ECtHR] case law is not strictly binding it has been held that courts should, in the absence of some special circumstances, follow any clear and constant jurisprudence of the Strasbourg court. …This reflects the fact that the Convention is an international instrument, the correct interpretation of which can be authoritatively expounded only by the Strasbourg court. …It is of course open to member states to provide for rights more generous than those guaranteed by the Convention, but such provision should not be the product of interpretation of the Convention by national courts, since the meaning of the Convention should be uniform throughout the states party to it. The duty of national courts is to keep pace with the Strasbourg jurisprudence as it evolves over time: no more, but certainly no less.'

Our chief concerns arise in three categories of case. Firstly, in cases where there is a genuine disagreement about the content or scope of a Convention right between a domestic court and Strasbourg, the domestic court should say so clearly and give its reasons. In our view, the courts have shrunk away from overt criticism by hiding behind the *Ullah* approach, claiming to find an inconsistency in the Strasbourg jurisprudence. In our submission, British courts should recall that they may and should sometimes disagree with the ECtHR and thereby facilitate 'a healthy dialogue' (Lord Mance in *DSD*).[17]

> 'Disagreement should not be commonplace, but it should not be considered to be restricted to extraordinary circumstances. In deciding cases, there is a legitimate space for a domestic court to determine the applicability of previous jurisprudence, both domestic and from Strasbourg, particularly bearing in mind that many of the Convention rights are qualified rights to find a breach of which the court must be satisfied that the legislation, policy or other act or omission complained of was not 'necessary in a democratic society'.

Lord Sumption in *R (Chester) v Secretary of State for Justice*[18] provides further support for a new approach:

> 'In the ordinary use of language, to "take into account" of a decision of the European Court of Human Rights means no more than to consider it, which is consistent with rejecting it as wrong.'

Yet further support was given by the late Sir John Laws, who recently delivered[19] a sharp criticism of the *Ullah* approach, which in his view mischaracterised the duty to take into account, undermined 'an autonomous development of human rights law by the common law

[16] [2004] UKHL 26, para [20]
[17] *DSD v Commissioner of Police of the Metropolis* [2018] UKSC 11, para [152]
[18] [2013] UKSC 63
[19] Sir John Laws, *The Constitutional Balance* (Hart, 2021), pp 126-8

courts', and provided too simplistic a notion of 'the correct interpretation' of the Convention, bearing in mind the fact-sensitivity of each case and contextual variation among ECHR states parties. He added:[20]

> 'The statutory purpose, taking Ss 2 and 6 together, must in my view be that the S. 6 duty is to be applied and understood by reference to our domestic courts' own appreciation of the Convention rights, taking into account, but not necessarily following, the Strasbourg jurisprudence; however, as I have said, such an autonomous development of human rights law by the common law courts was undermined by the *Ullah* approach'

Although domestic courts should continue to show great respect for the Strasbourg court, they should not feel constrained by the HRA from cutting to the chase of a particular question, rather than tiptoeing around a difficult issue out of an excess of deference to a line of decisions which they cannot satisfactorily reconcile with the merits of the case in front of them.

This not only brings benefits for the parties *in casu* and for domestic law and government in general, but also for the ECtHR and its jurisprudence. If the Strasbourg conception of the ECHR as a 'living instrument' is to be taken seriously, then the judgments of the ECtHR cannot be relied on as simple precedents.[21] Each case will call for a reassessment of the merits, with the clarity of ECtHR jurisprudence and the importance of the integrity of the ECHR community given proper, but not excessive, weight.

Second are cases in which domestic courts are unable to rely on a 'clear and constant jurisprudence of the Strasbourg court'. Here, the domestic courts should not be tempted to 'forge ahead' of the ECtHR. Where the Strasbourg jurisprudence is unclear, there is of course some room for dialogue, but the most useful way in which domestic courts may engage in this dialogue is by developing – if reasonably possible – the provisions of domestic law incrementally in accordance with the common law tradition rather than usurping the role of the Strasbourg court in providing authoritative determinations of the content of Convention rights. As Lord Brown put it in *Al Skeini*, Lord Bingham's 'last sentence could as well have ended: "no less, but certainly no more."'[22]

The third category is cases which come within the margin of appreciation recognised by the ECtHR, and in which, therefore, key questions are determinedly not resolved in Strasbourg. Relevant concerns must here differ from those relating to cases belonging to the second category, for the ECtHR has decided both (a) that there may be (limited) divergence across the states party to the ECHR and (b) that the scope of the right in question should be determined at a national level.

If states wish to 'forge ahead' of Strasbourg in order to resolve the questions posed, this should take place in the legislature.

An amendment to S. 2 that encourages courts to consider not only Convention rights but also other provisions or authoritative decisions of domestic law and relevant international parallels would help to ensure the proper allocation of constitutional responsibility, by reasserting the importance of the orthodox method of the common law, proceeding by incremental changes and informed analogy.

It is for these reasons, as well as for the reasons set out in our specific answers below, that we propose a legislative amendment to S. 2, guiding the courts more fully in their duty (1) to start with domestic case-law and to take into account not only Strasbourg jurisprudence but also

[20] Ibid. p.128
[21] *Tyrer v UK* (5856/72), para [31]
[22] *R (Al Skeini) v Secretary of State for Defence* [2007] UK HL 26, para [106]

other legal sources, principally the common law and the long-standing tradition of rights embodied therein.

We propose amendments to S. 2 to read:

Section 2: Interpretation of Convention rights

(1) The primary source of case-law for the exercise of powers under this Act shall be domestic case-law.

(1A) A court or tribunal determining a question which has arisen in connection with a Convention right must take into account**, but is not obliged to follow,** any—

(a) Judgment … [etc] – (d) [No changes]

(1B) A court or tribunal which is concerned with the interpretation and application of a Convention right may, in so far as it considers it relevant, take into account as persuasive authority decisions on rights expressed in the same or similar terms of courts elsewhere in the common law world.

Note: Our proposed amendment to sub-section (1) is derived from the speech of Lord Reed in *R (Faulkner) (FC) v Secretary of State for Justice*[23] at para [29]:

> 'I would however observe that over time, and as the practice of the European court comes increasingly to be absorbed into our own case law through judgments such as this, the remedy should become naturalised. While it will remain necessary to ensure that our law does not fall short of Convention standards, we should have confidence in our own case law under section 8 once it has developed sufficiently, and not be perpetually looking to the case law of an international court as our primary source.'

Q1(a): 'How has the duty to "take into account" ECtHR jurisprudence been applied in practice? Is there a need for any amendment of Section 2?"

Our proposed S. 2 would clarify and rationalise the duty to 'take into account' in three ways. Firstly, it would counteract the tendency of litigants and domestic courts to rely too heavily on Convention rights at the cost of more appropriate rights protection by development of the common law. Secondly, it would promote greater critical analysis of the Strasbourg jurisprudence, carrying with it tangible benefits for the robustness of rights protection, the proportionality of domestic measures and the continued development of the ECHR. Thirdly, it would signal legislative endorsement for the courts to continue with their currently hesitant approach to cases in which they are invited to 'forge ahead' of the Strasbourg jurisprudence.

Overreliance on Convention rights

The Supreme Court has repeatedly criticised the tendency 'to see the law in areas touched on by the Convention solely in terms of the Convention rights', since 'the Convention rights represent a threshold protection' but, 'especially in view of the contribution which common lawyers made to the Convention's inception, they may be expected, at least generally even if

[23] [2013] UKSC 23 at para [29]

not always, to reflect and to find their homologue in the common or domestic statute law.'[24] The HRA 'does not supersede the protection of human rights under the common law or statute,or create a discrete body of law based upon the judgments of the European court. Human rights continue to be protected by our domestic law, interpreted and developed in accordance with the Human Rights Act when appropriate.'[25] In many cases, 'the starting point…is the domestic principle…with its qualifications under both common law and statute. Its application should normally meet the requirements of the Convention, given the extent to which the Convention and our domestic law in this area walk in step'.[26]

These dicta are much to be welcomed. There has been a worrying trend of practice among litigants to found their arguments on the HRA and the EHCR rather than provisions of other domestic law and common law rights in particular. The arrival of the HRA led to a regrettable decline in the courts' and litigants' reliance on common law rights, particularly in the field of natural justice, to the detriment of rights protection. As Dinah Rose QC put it succinctly in 2011, '[w]e have taken our eyes off the roast beef, and tasted too much of the ragout.'[27]

The danger of this trend is that rights protection will be reduced to the lowest common denominator since, as explained below, the courts are rightly hesitant to 'forge ahead' of Strasbourg in giving greater scope to Convention rights. If they (or litigants) are also unwilling to invoke the stronger protections to be afforded under domestic law, then rights protection will be in retreat.

A critical approach to Strasbourg jurisprudence

The ECHR has been described by judges in Strasbourg as a 'living instrument', whose provisions are constantly developing to meet changing times.[28] That is not a term of the Convention and has been used to justify developments which should be left to national legislatures. Further such statement should not be allowed to cloud our critical faculties or those of our judiciary. It is not antithetical to the ECHR, therefore, to apply a critical eye to any line of Strasbourg jurisprudence in order to determine whether its continued application can be justified. Nor does such an approach contradict the aims of the HRA.

In some cases, the UK courts may have already considered an issue and reached a different conclusion from judges in Strasbourg. An example is whether the police should have a liability to pay compensation for negligence in solving crime. This is an issue which has been considered at the highest level in the UK on a number of occasions, including in *Hill v Chief Constable of West Yorkshire*,[29] *Michael v Chief Constable of South Wales*[30] and most recently in *Robinson v Chief Constable of West Yorkshire*,[31] The conclusion of the common law has consistently been that such claims may not be brought, although there has been dispute among the judiciary as to the extent to which public policies specific to the police lead to this result as opposed to a more general principle of the common law which eschews liability for omissions (itself rooted in a policy choice). In *DSD v Commissioner of Police of the Metropolis*[32] the Supreme Court, following what the majority identified to be a clear line of Strasbourg case

[24] *Kennedy v Charity Commissioner* [2014] UKSC 20, para [46] per Lord Mance
[25] *Osborn v Parole Board* [2013] UKSC 61, para [57] per Lord Reed
[26] *A v BBC* [2014] UKSC 25, para [57]
[27] 2011 Lord Atkin Memorial Lecture, para [93]
[28] *Tyrer v UK* (5856/72), para [31]
[29] [1987] UKHL 12
[30] [2015] UKSC 2
[31] [2018] UKSC 4
[32] [2018] UKSC 11

law, held that claims for compensation for negligent failures to properly investigate crime could be made under the Convention and that being so the common law was nothing to the point. In his judgment at paragraphs 132 to 136 Lord Hughes pointed out that the important policy considerations underlying the common law had not been taken into account or put into the balance in any of the Strasbourg jurisprudence. We consider that there is force in his point, but the *Ullah* approach and focus on ECHR case law precluded the commencement of a "judicial dialogue" with Strasbourg on the matter.

It is only through critical engagement with the Strasbourg jurisprudence that British courts can make a distinctive and valuable contribution to the development of rights protection within the ECHR community. These points are addressed more fully below, in the discussion of judicial dialogue (Q 1(c)).

'Forging ahead' of Strasbourg

The courts are rightly hesitant of expanding the scope of Convention rights when the jurisprudence of the ECtHR is still undetermined on the matter:

> 'domestic courts should not, at least by way of interpretation of the Convention rights as they apply domestically, forge ahead, without good reason. That follows, not merely from Ullah, but, as Lord Hoffmann said in *In re G (Adoption: Unmarried Couple*),[33] para 36, from the 'ordinary respect' attaching to the European Court of Human Rights, and 'the general desirability of a uniform interpretation of the Convention in all member states'.[34]

It may be argued that 'forging ahead' of Strasbourg allows domestic courts to participate in a 'judicial dialogue' with the ECtHR. Although well intentioned, that suggestion risks placing the cart in front of the horse. As Lord Brown recognised in *Al Skeini v Secretary of State for Defence*[35], there is (para [106]):

> 'a greater danger in the national court construing the Convention too generously in favour of an applicant than in construing it too narrowly. In the former event the mistake will necessarily stand: the member state cannot itself go to Strasbourg to have it corrected; in the latter event, however, where Convention rights have been denied by too narrow a construction, the aggrieved individual can have the decision corrected in Strasbourg.'

If there is to be a dialogue, it must be one arising out of existing Strasbourg jurisprudence.

In the same case, Lady Hale set out the practical consequence of this principled approach (para [90]):

> 'While it is our task to interpret the Human Rights Act 1998, it is Strasbourg's task to interpret the Convention. … If Parliament wishes to go further, or if the courts find it appropriate to develop the common law further, of course they may. But that is because they choose to do so, not because the Convention requires it of them.'

This was affirmed by Lord Brown in *Rabone v. Pennine Care NHS Foundation Trust*[36] (para [113]):

[33] [2008] UKHL 38
[34] *DSD v Commissioner of Police of the Metropolis* [2018] UKSC 11, para [152] per Lord Mance
[35] [2007] UKHL 26
[36] [2012] UKSC 2

> 'The other, less often considered, limb of the *Ullah* principle is that the court may in certain circumstances if it wishes decide a case against a public authority by developing the common law to provide for rights more generous than those conferred by the Convention; but that it should not grant such rights by purporting to extend the reach of the Convention beyond that recognised by, or reasonably envisaged within, existing Strasbourg jurisprudence.'

This does not mean, of course, that a domestic court may not take an obvious next step in interpreting Convention rights,[37] but it does stand as a warning and as a signal of fundamental importance as to the nature of the courts' duty under s. 2 HRA:

> 'Lord Bingham's point [in *Ullah*], with which I respectfully agree, was that Parliament never intended to give the courts of this country the power to give a more generous scope to those rights than that which was to be found in the jurisprudence of the Strasbourg court. To do so would have the effect of changing them from Convention rights, based on the treaty obligation, into free-standing rights of the court's own creation.'[38]

We endorse this judicial approach; we believe that the proposed S. 2 would strengthen it by inviting both courts and litigants to consider the answers that might be given to the rights questions in issue by developments in domestic law other than under the HRA.

Judges continue to draw upon developments made in other legal systems, such as Canada. For example, the law of vicarious liability and the doctrine of illegality in tort have both been developed in recent years on the basis of Canadian authorities. In *Patel v Mirza*,[39] the majority found the judgment of McLachlin J in *Hall v Hebert*[40] of particular assistance in determining the underlying rationale of the illegality doctrine, namely the need to avoid incoherence and inconsistency in the law and prevent profit from wrongdoing (see paragraphs [101]-[102] in particular). In the field of vicarious liability, the House of Lords in *Lister v Hesley Hall*[41] drew heavily on the Canadian authorities of *Bazley v Curry*[42] and *Jacobi v Griffiths*[43] in adopting a broader, 'close connection' test, and the same Canadian cases were also influential in the development of a 'creation of risk' analysis in *Various Claimants v Catholic Welfare Society*.[44]

Therefore, the courts are quite right to rely on the orthodox methods of the common law – which already encompass a measure of judicial creativity and the use of international comparison – rather than to 'take two steps at a time' and leap ahead of the Strasbourg jurisprudence. Our proposed S. 2 does not seek to undermine or change the current approach in this field, but rather (a) provides legislative endorsement and (b) gives both litigants and the courts a guiding nudge towards other routes that may be available to recognise and remedy any wrongs discernible in the instant case.

[37] Recognised by Lord Brown in *Rabone*, para [112] (with whom Lord Walker agreed)
[38] *Ambrose v Harris* [2011] UKSC 43, para [19] per Lord Hope
[39] [2016] UKSC 42
[40] [1993] 2 SCR 159
[41] [2001] UKHL 22
[42] (1999) 174 DLR (4th) 45
[43] (1999) 174 DLR (4th) 71
[44] [2012] UKSC 56

Q1(b): 'When taking into account the jurisprudence of the ECtHR, how have domestic courts and tribunals approached issues falling within the margin of appreciation permitted to States under that jurisprudence? Is any change required?'

Cases falling within the margin of appreciation afforded by Strasbourg require determination at the national level. It is for national institutions, therefore, to allocate among themselves the proper forum for the resolution of the particular question. The overarching concern in deciding upon this allocation may be termed 'institutional competence'. The courts have erred in placing too much confidence in their own ability to determine the bounds of their institutional competence. The courts, guided by legislative amendment to S. 2, should instead adopt an approach more in keeping with the orthodox tradition of the common law, building on established rights by analogy and by appropriate international comparison.

Cases that fall within the margin of appreciation raise, by their very nature, acute questions of constitutional propriety. Sometimes courts will be able to determine these issues, but in many cases it is more appropriate for legislatures to do so, fortified as they are by an ability to draw on a wider pool of evidence, by their greater capacity for debate, disagreement and compromise, and by democratic legitimacy.

The courts have long recognised that cases within the margin raise this allocation question. In *Re G (Adoption: Unmarried Couple)*,[45] Lord Hoffmann said (para [37]) that '[t]he margin of appreciation is there for division between the three branches of government according to our principles of the separation of powers'. See too Lord Mance, resting the question on the 'appropriate weight [to be given] to considerations of relative institutional competence' (para [130]) and Lord Hope (para [48]):

> 'It is, of course, now well settled that the best guide as to whether the courts should deal with the issue is whether it lies within the field of social or economic policy on the one hand or of the constitutional responsibility which resides especially with them on the other... Cases about discrimination in an area of social policy, which is what this case is, will always be appropriate for judicial scrutiny.

Lord Hope's approach supports the distinction that is central to our submission, that the courts' 'constitutional responsibility' is to determine cases that raise legal questions – that is, questions that may be resolved by application of or by analogy with previously decided legal principles. Lord Hope was quite right to note that discrimination in social policy is such an area.

We are more troubled, however, by the decision of the Supreme Court in *Re NIHRC*,[46] in which the Supreme Court determined that it should answer the substantive question on abortion rights given that the Northern Ireland Assembly had at that time failed to meet for a considerable period of time. We fear that the reasoning at para 120 is somewhat contrived and could lead to courts deciding that there are other areas of social policy where they should intervene because a different course has been taken from that in all or nearly all other states. We prefer the powerful dissenting judgment of Lord Reed (with whom Lord Lloyd Jones agreed) gave in which he said:

> '344. <u>At national level, it is equally important that the courts should respect the importance of political accountability for decisions on controversial questions of social and ethical policy.</u> The Human Rights Act and the devolution statutes have altered the powers of the courts, but they have not altered the inherent limitations of court proceedings as a means of determining issues of social and ethical policy. Nor have they diminished the

[45] [2008] UKHL 38
[46] [2018] UKSC 27

inappropriateness, and the dangers for the courts themselves, of highly contentious issues in social and ethical policy being determined by judges, who have neither any special insight into such questions nor any political accountability for their decisions'.

and

'362. These are highly sensitive and contentious questions of moral judgement, on which views will vary from person to person, and from judge to judge, as is illustrated by the different views expressed in the present case. They are pre-eminently matters to be settled by democratically elected and accountable institutions, albeit, in the case of the devolved institutions, within limits which are set by the Convention rights as given effect in our domestic law.'

Furthermore, the courts are, under the current approach, drawn too much into political considerations – e.g., *R (Nicklinson) v Ministry of Justice*.[47] Two aspects of the case concern us. Firstly, the Supreme Court seemed to suggest that they might in future grant a declaration of incompatibility under S. 4 if Parliament did not do something to remedy the legal situation in good time.[48] This seems to us to encourage a 'first-come-first-served' approach to the allocation question, and to depart from a proper analysis, grounded in the subject-matter at issue. Secondly, a majority in the Supreme Court were strongly persuaded by the fact that Parliament was at that time considering Lord Falconer's Bill on assisted dying.[49] While this may be taken to be a strong indication that this particular ball was in Parliament's half of court, we submit that a hypothetical inverse situation – in which Parliament was not currently considering a Bill on the matter – should not be taken as licence for a court to intrude without proper further analysis. In our submission, the Court of Appeal in *R (Conway) v Secretary of State for Justice*[50] was on much surer ground with its simple conclusion in paragraph [171]:

'The weight to be given to that risk, in deciding whether or not the blanket ban on assisted suicide is both necessary and proportionate, involves an evaluative judgment and a policy decision, which, for the reasons we give below, Parliament is, on the face of it, better placed than the court to make.'

That is not to say that the courts have no role in policy-related decisions. But they must tread with care.

The courts are expert in the development of the common law and the interpretation of statute. Centuries of evolution have produced the orthodox common law practice of reasoning in increments by analogy, and our constitutional order relies on the courts to interpret and apply the statutes enacted by Parliament. In the field of negligence, the courts have long recognised, and recently reaffirmed in strong terms, the dangers of departure from these long-standing techniques: see *Robinson v Chief Constable of West Yorkshire*,[51] cited above.

The proper role of the courts is defined to a great extent by the reach of the common law and by the canons of statutory interpretation. The stability and coherence afforded by the traditional methods of the courts is that they provide a much more resilient defence of rights from executive power in particular.

Our proposed Ss. 2 would not directly provide a solution to the courts' approach to cases falling within the margin of appreciation. What is required here is a shift in judicial attitude. However,

[47] [2014] UKSC 38
[48] R (Nicklinson) v Ministry of Justice [2014] UKSC 38, (para [118]) per Lord Neuberger
[49] See especially R (Nicklinson) v Ministry of Justice [2014] UKSC 38, paras [166], [190], [231]
[50] [2018] EWCA Civ 1431
[51] [2018] UKSC 4

it is hoped that there would be an indirect effect, whereby the greater openness with which the courts approach the differences in ECHR and common law rights protection will engender a greater hesitancy to expand upon Convention rights within the margin of appreciation. Where the common law 'runs out' and cannot be developed to meet the case by the orthodox, incremental method, the courts should take that as a strong indication that the proper forum for the question is a political, not a legal, one and should stay their hand.

Q1(c): 'Does the current approach to 'judicial dialogue' between domestic courts and the ECtHR satisfactorily permit domestic courts to raise concerns as to the application of ECtHR jurisprudence having regard to the circumstances of the UK? How can such dialogue best be strengthened and preserved?'

The British courts' general approach to 'judicial dialogue' with the ECtHR was set out by Lord Neuberger in *Manchester City Council v Pinnock*[52] (para [48]):

> 'As Lord Mance pointed out in *Doherty v Birmingham City Council* [2009] 1 A.C. 367, para. 126, S. 2 of the 1998 Act requires our courts to 'take into account' European court decisions, not necessarily follow them. Where, however, there is a clear and constant line of decisions whose effect is not inconsistent with some fundamental substantive or procedural aspect of our law, and whose reasoning does not appear to overlook or misunderstand some argument or point of principle, we consider that it would be wrong for this court not to follow that line.'

Our proposed S. 2 would strengthen and preserve it against any temptation to resile from the current position. A central aim of the HRA was not only to 'bring rights home' by allowing litigants to enforce their European rights in British courts, but also to do so by bringing the content of those rights closer into line with domestic expectations and contexts:

> 'British judges will be enabled to make a distinctively British contribution to the development of the jurisprudence of human rights in Europe.'[53]

It is this latter aspect which the proposed S. 2 would strengthen. By requiring courts to take into account the answers that relevant domestic, international and foreign law would give to the question posed in a case that raises a Convention right. Our amendment would help deliver a 'distinctively British contribution' at a European level. If fault is to be found with the current approach to 'judicial dialogue' taken by the UK courts, it is that judges do not sufficiently juxtapose the differing answers that would be given under the ECHR and under other domestic law, but often restrict themselves merely to pointing out inconsistencies in the Strasbourg jurisprudence.

This restricted approach which has its foundation in *Ullah* (discussed above) should not seek to dissuade the UK courts from pointing out such inconsistencies. One example is *Gale v Serious Organised Crime Agency*,[54] in which three members of the Supreme Court determined that there were considerable inconsistencies in the ECtHR case law, which required a Grand Chamber decision to clarify and rationalise.[55] The Strasbourg court, although treating its previous decisions with some considerable weight,[56] lacks a doctrine of *stare decisis*, and

[52] [2010] UKSC 45
[53] *Rights Brought Home: The Human Rights Bill*, Cm. 3782, October 1997 at para. 1.14
[54] [2011] UKSC 49
[55] Lords Phillips, Clarke and Brown at paras [32], [60], [117]
[56] *Chapman v United Kingdom* (27238/95) (2001) 33 E.H.R.R. 18 at [70]; *Goodwin v United Kingdom* (28957/95) (2002) 35 E.H.R.R. 18 at [74]

domestic courts must continue rigorously to assess any alleged 'line' of cases for its coherence and general applicability.

But such language often obscures the true nature of the domestic court's challenge to the Strasbourg jurisprudence. A prime example of this may be seen in *R (Hicks) v Comr of Police of the Metropolis*,[57] in which the court was determined, we suggest, to find that the 'Strasbourg case law on the point [was] not clear and settled' (para [32]). This approach – heavily influenced by *Ullah* – was used by the court as something of a shield behind which to challenge a long line of Strasbourg jurisprudence culminating in *Ostendorf v Germany*.[58] The true grounds of the Supreme Court's challenge to the ECtHR are instead to be found in paragraph [31]:

> 'In this case there was nothing arbitrary about the decisions to arrest, detain and release the appellants. They were taken in good faith and were proportionate to the situation. If the police cannot lawfully arrest and detain a person for a relatively short time (too short for it to be practical to take the person before a court) in circumstances where this is reasonably considered to be necessary for the purpose of preventing imminent violence, the practical consequence would be to hamper severely their ability to carry out the difficult task of maintaining public order and safety at mass public events. This would run counter to the fundamental principles previously identified.'

Although the Supreme Court's judgment speaks of the 'fundamental principles' only in terms of Article 5 ECHR (paras [29]-[30]), the dicta in paragraph [31] would sit comfortably in any judgment founded on common law constitutional rights. It is regrettable, then, that common law rights and principles do not feature explicitly in the Supreme Court's judgment in *Hicks*, especially because the reasoning of the judgment did succeed in influencing the subsequent decision of the Grand Chamber in *S v Denmark*[59] (para [116]).

Explicit reference to the treatment of relevant rights questions in domestic law outside the HRA (particularly common law) can only be beneficial in judicial dialogue about the content of rights and their protection.

This stronger form of dialogue was adopted in *R v Horncastle*,[60] in which the court refused to follow the Chamber decision in *Al-Khawaja*.[61] At paragraph [11], Lord Phillips set out the court's approach to dialogue:

> 'There will, however, be rare occasions where this court has concerns as to whether a decision of the Strasbourg Court sufficiently appreciates or accommodates particular aspects of our domestic process. In such circumstances it is open to this court to decline to follow the Strasbourg decision, giving reasons for adopting this course. This is likely to give the Strasbourg Court the opportunity to reconsider the particular aspect of the decision that is in issue, so that there takes place what may prove to be a valuable dialogue between this court and the Strasbourg Court. This is such a case.'

This approach has much to be commended. It recognises that courts may constructively engage in frank discussion about the content of rights across different contexts and legal systems. The strong approach taken here was perhaps felt by the Supreme Court to be permissible because of the invitation implicit in the Grand Chamber's adjournment of consideration of the question awaiting the Supreme Court's judgment (discussed at para [9]). In our submission, however,

[57] [2017] UKSC 9
[58] (2013) 34 BHRC 738
[59] (2018) 68 EHRR
[60] [2009] UKSC 14
[61] *Al-Khawaja and Tahery v UK* [2009] 49 EHRR 1

that invitation should be thought to be ever-present. Of course, recent Grand Chamber authority on the very point (as in *A v UK and AF (No. 3)*[62] must be very persuasive material,[63] but it is far from the only material that the domestic court should consider.

Lord Rodger's pithy dictum that 'Argentoratum locutum, iudicium finitum', *AF (No. 3)*[64] (para [98]) should mean no more than that last proposition. The apparent resolution of a question in Strasbourg is not the end of the road. While there will continue to be 'hard' and 'easy' cases to resolve, given the state of the authorities and the facts at issue, domestic courts always have an important and independent judicial role in applying rights jurisprudence in a domestic law context. It has been said by one senior judge that it is only where the Strasbourg jurisprudence is unclear that the domestic court has a 'real judicial choice'.[65] Yet there is almost always scope for further analysis of the content and scope of the Convention right and its applicability to the issues raised in the case. Lord Rodger's famous dictum arose in a very specific context, where the Grand Chamber had very recently given an answer (in *A v UK* (no. 3455/05)) to the very same question about the same legislation that faced the House of Lords. The simplicity of approach implied by the dictum cannot apply across the board, as Lord Brown recognised in *R v Horncastle* (paras [117]-[118]).

Furthermore, courts should – in our submission – remember that the UK is not bound (per Article 46(1) ECHR) to abide by Strasbourg judgments in cases to which the UK is not a party. British courts should be particularly cautious not to abandon their independence of thought and their proper judicial role by applying Strasbourg jurisprudence determined upon the basis of circumstances that may be significantly different to those in the UK.

Our proposed S. 2 does not, therefore, radically change the way in which UK courts engage in judicial dialogue with Strasbourg. Rather, it draws out of their current approach a presently tentative strand of substantive debate and seeks to strengthen it. By encouraging courts to come out from behind the *Ullah* shield and to state the grounds of their disagreements with greater clarity and authority, drawing upon Britain's long tradition of common law rights and bringing in relevant comparisons with provisions of international and foreign law, our courts may make that 'distinctively British contribution' to the development of ECHR jurisprudence with confidence.

[62] [2009] UKHL 28
[63] As Lord Brown recognised in *Horncastle* [2009] UKSC 14 paras [117]-[118]
[64] [2009] UKHL 28
[65] *Ambrose v Harris* [2011] UKSC 43, para [104] per Lord Dyson

THEME TWO
The impact of the HRA on the relationship between the judiciary, the executive and the legislature.

GENERAL MATTERS

Our principal criticism under this theme (in our general introduction) is of the use that has been made of S. 3 HRA. It has drawn the courts into a quasi-legislative role and deviated too far from traditional and predictable methods of interpretation. We propose below an amendment to S. 3 that would provide constructive guidance to the courts, guarding against future misinterpretation.

It has always been the role of the courts to interpret legislation.[66] The role of authority constrains the judiciary in their interpretative function in ways desirable for the rule of law: requiring precedent to be given effect and constraining the expansion of new rights. The courts must no longer move into over-interpretation. S. 3 must be amended.

Since at least the fourteenth century it has been the role of Parliament to approve the actual terms of legislation. But it goes further than that. The court has to opt for one meaning or another for the words in front of it and cannot go beyond those words. Parliament can achieve compromises in wording which balance competing concerns and choose the wording accordingly. That is particularly significant and relevant where the court has found that a statute is not on its face compatible and compliant with the Convention. Parliament is and should remain the primary voice on rights issues.

Parliament's role in approving the words of statutes and the courts' role in interpreting them have a symbiotic relationship developed through conventions and canons over time. The courts have, for their part, sometimes required Parliament to be more explicit in the phrasing of statutes to achieve a particular legal effect, particularly where individuals' rights are concerned.[67] For its part, Parliament has retained in principle the means and ability to ensure that ambiguity does not occur in the preparation and scrutiny of draft legislation. When Parliament fails to achieve that, the courts do what they can to help. But that has always been a task performed within bounds. The established conventions and canons of interpretation are essential to the principles of the primacy of statute (hard won against oligarchists, absolute monarchists, and political dogmatists) and the rule of law, an important part of which is the predictability of legal outcomes for those subject to them.

In the years immediately following the HRA's commencement in October 2000, it may well be said that there was good reason for the relatively greater number of judicial interventions than in more recent years, whether by S. 3 (interpretation beyond what would have occurred but for S. 3) or S. 4 (declaration of incompatibility). There are likely to be few (if any) remaining instances of pre-HRA statutes whose interpretation (on traditional lines) will in the future give rise to the risk of finding of non-compatibility.

The way in which S. 3 has been interpreted – as allowing for unreasonable but 'possible' constructions – can no longer be justified. Since the HRA's commencement, ministers and draftsmen, aided by the Joint Committee on Human Rights and (often underestimated)

[66] *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997, 1030 B–D; *R(Privacy International) v Investigatory Powers Tribunal* [2019] UKSC 22
[67] *Ex parte Simms* [1999] UKHL 33

members of the legislature, have taken care to ensure that new primary legislation is Convention-compliant.

When and if an issue arises and the court, applying traditional canons of construction considers the provision non-compliant, the court should not then be diverted by S. 3 (1) into straining to fit a square peg into a round hole. Rather it should declare the provision incompatible under S. 4 and leave it to Parliament to address the matter.

Ongoing scrutiny by the courts of the compatibility of legislation remains as important as it always has. Our argument is that the way in which such scrutiny has been carried out should no longer stray from the important principles set out above. The method sometimes employed by the courts under S. 3 HRA would, we believe, surprise the parliamentarians who enacted the HRA. It operates in too stark a contrast with the traditional and proper methods of the courts, which are fundamental elements of our constitutional arrangements.

Of course, in passing the HRA, the legislature also constrained the power of the executive, which henceforth would be faced with a choice: act only in accord with the rights contained in the ECHR or explicitly make clear that you wish to act contrary to those rights and seek approval in Parliament. As Conservatives, that constraint on the power of the executive is to be welcomed. It imposes a necessary political cost on changes to the law and, more particularly, on changes that affect the rights of ordinary citizens.

It has the inevitable result that the executive will occasionally find its actions ruled incompatible with the HRA. That is not a bad thing. It is precisely the purpose of an independent judiciary in a system that abides by the Rule of Law.

As Lord Bingham put it:

> 'There are countries in the world where all judicial decisions find favour with the powers that be, but they are probably not places where any of us would wish to live.'[68]

When the court makes a declaration of incompatibility, Parliament is confronted directly with the statute's offending words. The history of the last 20 years shows that both the executive and Parliament take their responsibilities seriously. Even in the contentious case of prisoners' votes the government brought three legislative alternatives forward and put them to the vote. The JCHR, if no one else, will not allow such matters to remain in the long grass.

We turn now to address the specific questions asked in this **Theme Two.**

[68] Tom Bingham, '*The Rule of Law*' (Kindle Locations 1139-1140). Penguin Books Ltd. Kindle Edition.

Q2(a): Should any change be made to the framework established by Sections 3 and 4 of the HRA?

We propose legislative amendment to S. 3 HRA to correct the courts' current construction of the interpretative method under that Section. Our answer will be structured as follows: firstly, to set out our amendment to S. 3(1); secondly, to set out our proposed new S. 3 (1A) and (1B); thirdly, to address sub-question (ii) on previous uses of Section; and fourthly, to address the proper balance to be struck between use of Ss 3 and 4. The proposed S. 3 as amended is set out in full at the end of our answer to this question.

Statutory Interpretation

Section 3(1): the absence of 'reasonable'

Section 3(1) HRA currently reads:

> 'So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.'

Two particular issues arise in connection with this wording. They are:

(a) the absence of "reasonable"; and

(b) the meaning of "possible".

We propose an amendment to Section 3(1) to address the former, and the insertion of new Section 3(1A) and (1B) to address the latter.

When the Human Rights Bill was being introduced into the House of Commons by the Home Secretary there was the following exchange with a future Attorney-General:

> **Mr. Straw:** ... for the avoidance of doubt, I will say that it is not our intention that the courts, in applying what is now clause 3, should contort the meaning of words to produce implausible or incredible meanings. I am talking about plain words in what is actually a clear Bill with plain language--with the intention of Parliament set out in Hansard, should the courts wish to refer to it.
>
> **Mr. Grieve:** Perhaps the clause should say "possible and reasonable", but the right hon. Gentleman might then say that the courts are always supposed to be reasonable, so it is not necessary to include that word.
>
> **Mr. Straw:** Ever since the Wednesbury decision, the courts have chided others for being unreasonable, so it is difficult to imagine them not being reasonable. If we had used just the word "reasonable", we would have created a subjective test. "Possible" is different. It means, "What is the possible interpretation? Let us look at this set of words and the possible interpretations." My bet is--without putting this in the Bill-- ... that the courts will say that they will adopt a reasonable approach.

However, in striking and surprising contrast to the assumption of Mr Straw and Mr Grieve that the courts would adopt only interpretations which were reasonable, a few years later Lord Steyn said in *Ghaidan v Godin-Mendoza*[69] at paragraph [44]:

> 'Parliament specifically rejected the legislative model of requiring a reasonable interpretation.'

Lord Steyn based his view on the fact that a few years earlier the New Zealand legislature had enacted a similar statute which did include the word "reasonable". Since the HRA's text does

[69] [2004] AC 557

not include the word "reasonable", Lord Steyn concluded that Parliament must have deliberately left out a criterion of reasonableness: the inevitable corollary is that the courts should adopt unreasonable interpretations.

Whatever may be thought about Lord Steyn's judgment as a matter of law, here is a clear situation in which Hansard reveals that the highest court has misunderstood the intention of Parliament.

The courts have persisted in this misunderstanding, and *Ghaidan* is frequently cited as high authority for the wide powers of S. 3. In a recent example, the court in *R (Aviva Insurance Ltd) v Secretary of State for Work and Pensions*[70] interfered with the statutory scheme of the Social Security (Recovery of Benefits) Act 1997, holding that 'the fact that the reading down would in substance create an exception [to the insurer's statutory liability] where none currently exists, is comfortably within the permitted scope of interpretation pursuant to HRA section 3 as explained in *Ghaidan'* (para [36]).

As a further example, readers of the plain words of the Marriage (Northern Ireland) Order 2003 would be surprised to learn that a 'religious body' whose members may be granted authorisation to conduct marriage ceremonies includes the British Humanist Association. In *Re Smyth's Application for Judicial Review*,[71] the court again did not 'read down' but 'read in', adding 'or belief' after every instance of the word 'religion' in the relevant regulation. Even setting aside the societal contentiousness of the subject-matter here, the court went further than interpretation, spilling over into interpolation. It is significant that Colton J cited Gillen LJ's gloss on *Ghaidan* in *Re E's Application*:[72]

> '[Section 3] allows the court to alter the meaning of the words even if to do so will involve a departure from the meaning they were intended to have when the provision was enacted by Parliament.'

The misunderstanding that first arose in *Ghaidan* should be corrected by inserting the word which the Home Secretary may have considered too obvious to be necessary, but which Lord Steyn thought had been deliberately omitted.

Therefore, our first proposal is the insertion of the word "**reasonably**" so that s. 3(1) begins "So far as it is **reasonably** possible to do so…".

<u>Our Proposed Section 3(1A) and (1B): the meaning of "possible"</u>

In the same case (*Ghaidan v Godin-Mendoza*) Lord Nicholls found difficulty with the word "possible". He said, at paragraph [27],

> 'Unfortunately, in making this provision for the interpretation of legislation, S. 3 itself is not free from ambiguity. The difficulty lies in the word 'possible'.... What is not clear is the test to be applied in separating the sheep from the goats. What is the standard, or the criterion, by which 'possibility' is to be judged? A comprehensive answer to this question is proving elusive.'

The fifth edition of *Bennion on Statutory Interpretation* commented on Lord Nicholls' remarks:

> 'This criticism is expressed with the understatement to be expected of their Lordships House. Reading between the lines one senses a fine lawyer's outrage that so vital a provision should be expressed in so clumsy a way. In fact the fault lies not in the drafting

[70] [2021] EWHC 30 (Admin)
[71] [2017] NIQB 55
[72] [2007] NIQB 58

but the conception. The political desire was to distort the true meaning of legislative language so as to facilitate the fuller application of the Convention.'

Whether that stricture is justified or not, the very fact that such passages have been written is reason enough for Parliament to respond to the request from the apex of the judiciary for elucidation as to the criteria against which it should be judged what is "possible". There are plenty of precedents for Parliament providing a list of factors to be taken into consideration by a court when approaching a decision.[73]

Furthermore, the provision of such guidance provides support for the predictability of the law, which is (as set out in our general comments) a fundamental element of the rule of law. The current approach to S. 3 produces unpredictability, which does not just harm individuals' ability to guide their conduct lawfully. It also leads to bad administration since the S. 3 duty binds public administrative bodies as much as the courts. Different bodies taking different interpretations – potentially of the same legislation – produces disparities in treatment that necessarily strike at the principle of good administration.

The content of the law becomes more and more uncertain the greater the number of S. 3 interpretations are given of particular words and phrases, leaving no discernible mark or warning for the reader of the statute.

As an example, a particularly fraught area of statute is S. 54 of the Human Fertilisation and Embryology Act 2008, which regulates the making of parental orders over children born via surrogacy. Following a S. 3 interpretation that permitted a joint application by both (non-birth) parents to be granted where one of the applicants had died after the application had been made (*A v P*),[74] the courts have subsequently expanded their interpretation to include joint applications where one of the (non-birth) parents had died before the birth *(Re X (Parental Order: Death of Intended Parent Prior to Birth))*[75] and most recently to permit a *separated* couple to be recognised as the legal parents (*Re A (Surrogacy: s.54 Criteria)).*[76] This stands in stark contrast to the words of the Section, in which a couple must be married, in a civil partnership or 'living as partners in an enduring family relationship'.

The more the courts depart from the meaning that would be produced by the standard canons of construction, the more inaccessible the law becomes to its subjects, not only through their own incomprehension but also through the narrowing of the pool of legal practitioners who are able to give reliable advice.

If S. 3 continues to be the primary remedy applied by the courts, many statutes will acquire this unreadable quality. In our submission, it is clear that particularly difficult areas of statute such as S. 54 of the 2008 Act, whose ordinary interpretation has been replaced repeatedly by S. 3 interpolations, begs for a S. 4 remedy instead. It is then at least open to the Government and Parliament to consider the flaws of the legislation in the round.

Appropriate guidance would address the core criticisms. We would amend S. 3 as follows:

[73] As an example, see s.25 of the Matrimonial Causes Act 1973
[74] [2011] EWHC 1738 (Fam)
[75] [2020] EWFC 39
[76] [2020] EWHC 1426 (Fam)

Section 3: Interpretation of legislation

(1) So far as it is **reasonably** possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.

(1A) Nothing in this section detracts from the principle that if there is nothing to modify, alter or qualify the language which primary and secondary legislation contains, the words and sentences must be construed in their ordinary and natural meaning.

(1B) In considering whether an interpretation of primary or secondary legislation, at which a court might have arrived by the application of interpretative criteria apart from the effect of this section, is compatible with Convention rights, the court shall inter alia take into account the following facts and matters:

(a) the fact that there is not normally available to a court as much information on the context, or the implications of possible policies, as is available to Parliament and to ministers;

(b) the consideration that Parliament has the primary role in balancing conflicting rights and interests;

(c) the consideration that citizens have responsibilities as well as rights;

(d) the principle of the common law that any activity is normally permissible unless there is a specific basis for it being held to be unlawful[77];

(e) the decisions of courts elsewhere in the common law world.

(2) [NO CHANGES]

(3) Decisions purporting to interpret by reference to this Section as amended that were made prior to the coming into force of this amendment are to be taken to have given their interpretations as if they were in accordance with this amendment.

The new sub-Section (3) above is to meet the concerns that if S. 3 is amended to change the approach to interpretation, then statutes that have been interpreted in a manner that relies on S. 3 would be open to re-interpretation. It is to meet any suggestion that cases which had been so interpreted would no longer be authority on the statute's meaning, so that a statute that had meant one thing between October 2000 and the date of the HRA amendment (say, 2022), would then mean something else again after that date.

[77] For this principle see Page 1 and footnotes 1 and 2 and the discussion in *Beatson and Others*, Sweet & Maxwell 2008, ch. 1-10 and the discussion in *Arlidge and Eady* citing *Dicey*.

The increased use of Section 4

In response to question 2(a)(iii), we say that, while S. 4 is not an interpretative measure (as the question seems to imply), a natural consequence of the proposed correction to the courts' use of the S. 3 interpretative exercise may be that declarations of incompatibility under S. 4 become more commonplace. We propose new safeguards in the related S. 10 procedure for Remedial Orders (in response to question 2(d) below), and we make the following observations:

Firstly, S. 4 places the question of the resolution of competing rights claims into the political sphere. As explored above, human rights cases often bring up so-called 'polycentric' problems that are more suitable for political resolution. Unlike the blunt instruments available to the courts, Parliament is able to broker more nuanced solutions between the government, pressure groups and democratic representatives. It is also equipped with the JCHR, which is an innovative forum that brings legal, governmental and political perspectives to bear on problems and can exercise pressure both publicly and privately.[78]

Secondly, we should not allow parliamentarians to leave the difficult decisions to the courts. The Human Rights Act has given rise to the impression that human rights questions are really legal questions, in the sense that the courts have a higher authority in pronouncing their answers than Parliament has. This is not only incorrect but also threatens rights protection in legislation. Overuse of S. 3 powers by the courts gives parliamentarians licence to avoid answering difficult questions and to treat legislation as a mere signal of their opinion, content in the knowledge that the courts will, in the words of Baroness Hale, 'make it work'.[79] As Lord Hoffmann once said in the context of the principle of legality, 'Parliament must squarely confront what it is doing and accept the political cost'.[80]

Thirdly, the JCHR has strengthened Parliamentary scrutiny of rights issues raised by legislation. A role for the courts remains. But they should be careful not to intrude upon Parliament's prior determinations of these questions.

Fourthly, a S. 4 declaration is a public act, and often widely reported. It is a concrete decision which political actors can cite as authority for their case and bring about legislative reform via the legislature. Making a declaration does not just entrust the ball to Parliament's safekeeping, but serves it firmly into Parliament's end, in front of a packed Centre Court.

Q2(b): What remedies should be available to domestic courts when considering challenges to designated derogation orders made under section 14(1)?

We make no answer

Q2(c): Under the current framework, how have courts and tribunals dealt with provisions of subordinate legislation that are incompatible with the HRA Convention rights? Is any change required?

We make no answer

[78] See A. Kavanagh, '*The Joint Committee on Human Rights: a hybrid breed of constitutional watchdog*', in: Hunt, Hooper and Yowell (eds), '*Parliaments and Human Rights: Redressing the Democratic Deficit*' (2015)
[79] *Secretary of State for the Home Department* v. *MB* [2007] UKHL 46, at [73]
[80] [2000] 2 AC 115, 131

Q2(d): In what circumstances does the HRA apply to acts of public authorities taking place outside the territory of the UK? What are the implications of the current position? Is there a case for change?

We make no answer

Q2(e): Should the remedial order process, as set out in section 10 of and Schedule 2 to the HRA, be modified?

The role of the Joint Committee on Human Rights

The JCHR's terms of reference require it to produce a report on the proposed RO, including a recommendation (of approval or disapproval) for ROs made under the urgent procedure.[81]

However, the RO procedure does display significant weaknesses, especially when compared with the super-affirmative resolution procedure for other delegated legislation.[82] For example, Legislative Reform Orders (which may also be used to amend primary legislation) are restricted as to their scope, especially in the fields of taxation, criminal offences and individual liberty.[83] Furthermore, a committee charged with consideration of a proposed order under the super-affirmative procedure has an effective veto (which may be overridden by the House) on the draft order. Neither of these controls apply to ROs.

That said, the RO procedure is, *prima facie*, stronger in one aspect, in that it requires a 120-day period for Parliamentary consideration rather than a 60-day one. On the other hand, actual scrutiny on the floor of either House is weak, seldom attracting substantive debate.

A further significant weakness is that the urgent procedure (HRA sch. 2, para 4) places an overly long 120-day time-out on ROs made before resolution of the Houses. This is three times longer than the period allowed under the affirmative procedure, and therefore allows an unsatisfactory order to persist beyond reasonable time. Although the urgent procedure has only been used once (following a JCHR recommendation),[84] recent events have shown how the careful balance between urgency and scrutiny may easily be upset.

We are not resolved on any particular reform of the procedure, which ultimately is a matter for Parliament, but offer the following (non-exclusive) options for the Review's consideration:

1. Whenever there is a declaration of incompatibility it should be the norm for the JCHR to consider the matter and report within a suitable time.
2. It should also be the norm that such report be debated in Parliament before any further step is taken whether by way of RO or a remedial statute, or indeed no action.
3. Strengthening the involvement of the JCHR by:
   a. Amending schedule 2 HRA to include a statutory requirement for the JCHR to report on a proposed RO; and/or
   b. Granting the JCHR a veto power by analogy with the LRRA 2006.

[81] SO No 152B(3)-(4) of the House of Commons; House of Lords Journal 233 (1999–2000) 573
[82] Legislative and Regulatory Reform Act 2006, s. 18; Erskine May, para 41.11
[83] Legislative and Regulatory Reform Act 2006, ss 3-8
[84] HL Deb (11 April 2002), vol. 633, cc 601-7

4. Introducing limits on the subject-matter to which ROs may be applied, by analogy with the LRRA 2006.
5. Shortening the 120-day period under the urgent procedure to 40 days.

Such procedure mandating a report followed by proper debate at the outset will ensure that parliamentarians as a whole engage with the issue of rights more fully and bring to bear the full range of relevant policy considerations. It will strengthen rights.

Benet Brandreth QC **London**

Jonathan Fisher QC **2 March 2021**

Timothy Foot

Guy Sandhurst QC

Anthony Speaight QC

Andrew Warnock QC